

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WESLEY KNIGHT, JR.,)	
)	
<i>Petitioner</i>)	
)	
v.)	Civil No. 99-267-P-H
)	
WARDEN, Maine State Prison,)	
)	
<i>Respondent</i>)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Wesley Knight, Jr., confined to the Maine State Prison in Thomaston, Maine, challenges on several grounds a forty-five year sentence imposed upon him in the Maine Superior Court in March 1992 following his conviction for murder. Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (“Petition”) (Docket No. 1). A habeas petition may be dismissed without an evidentiary hearing if “(1) the motion is inadequate on its face, or (2) the movant’s allegations, even if true, do not entitle him to relief, or (3) the movant’s allegations need not be accepted as true because they state conclusions instead of facts, contradict the record, or are inherently incredible.” *David v. United States*, 134 F.3d 470, 477 (1st Cir. 1998) (citations and internal quotation marks omitted). In this case, the petitioner’s allegations either do not entitle him to relief even if accepted as true or need not be accepted as true because they consist of mere conclusory allegations. I accordingly recommend that the petition be dismissed without an evidentiary hearing.

I. Background

On March 27, 1992 the petitioner was sentenced to serve forty-five years in prison following his conviction on a charge of murder. Petition at 1. A key prosecution witness at trial was Robert DeWalt, who had led police to the body of Timmy Pinkham, confessed involvement in the Pinkham murder and implicated other people, including the petitioner, in the commission of the crime. *See, e.g.*, Transcript of Proceedings, Trial Proceedings (with Jury), *State v. Knight*, Criminal No. 90-267 (Me. Super Ct.), filed with State's Response to Petition ("Response") (Docket No. 5) ("Trial Transcript"), Vol. II at 4-11 (prosecutor's opening statement).

Prior to trial, defense counsel for both the petitioner and Kevin Knight (his brother and co-defendant) sought a ruling on the admissibility of evidence that DeWalt had referred to himself as Sabian, the son of Satan, and was a Satan worshipper. Trial Transcript Vol. I at 136. Counsel argued *inter alia* that such evidence was probative of whether DeWalt was truthful. *Id.* at 138. The trial justice responded:

I don't see how that particular fact without more is going to shed a lot of light on credibility. It may shed a lot of light on character, but not on credibility. It's not — it doesn't go to his reputation for truthfulness. Do you know satanic beliefs? Maybe truth is a paradigm of satanic belief, for all I know.

Id. at 139. The justice clarified that, although she did not see how the Satanism evidence could become admissible, she did not foreclose the defense from endeavoring to present it at trial. *Id.* at 146-47. During trial, however, she twice advised counsel that she had heard nothing that would cause her to revisit her earlier rulings. Trial Transcript Vol. III at 192; Trial Transcript Vol. IV at 84-85. Defense counsel never moved to admit the Satanism evidence. *See State v. Knight*, 623 A.2d 1292, 1293 (Me. 1993). Claims concerning its admissibility hence were not properly preserved for

appellate review and could be examined only for obvious error. *Id.*

Also at trial, the State offered the testimony of the petitioner's sister, Teresa, and girlfriend, Lisa, to implicate him in Pinkham's murder. *Id.* The State impeached both witnesses with prior inconsistent statements. *Id.*; *see also* Trial Transcript Vol. III at 31, 62-64 (confronting Teresa with prior inconsistent statement implicating brothers in murder); Trial Transcript Vol. IV at 64-66 (confronting Lisa with prior inconsistent statement implicating petitioner in murder). Defense counsel did not object to the use of the prior inconsistent statements or request a limiting instruction. *Knight*, 623 A.2d at 1293. Hence, these claims too could be examined upon appeal only for obvious error. *Id.*¹

The trial jury convicted the petitioner of "intentional or knowing" murder in violation of 17-A M.R.S.A. § 201(1)(A). *Id.* at 1292. The petitioner appealed, and the Law Court on April 27, 1993 affirmed his judgment of conviction, finding *inter alia* no obvious error as to either exclusion of the Satanism evidence or use of the prior inconsistent statements. *Id.* at 1293-94. On the latter point, the Law Court observed that "absent a request for a limiting instruction, we can assume that counsel concluded that a limiting instruction would have overemphasized the importance of the evidence and decided to forgo the request for strategic reasons." *Id.* at 1293 (citation omitted).

On April 17, 1996 the petitioner filed an amended petition in Superior Court for post-conviction review. *See* Docket, Petition for Post Conviction Review, *Knight v. State*, Criminal No. 96-80 (Me. Super. Ct.) ("Docket"), filed with Response, at [1]. The petition was denied following an evidentiary hearing by order dated July 27, 1998. Order on Petitions for Post-Conviction Review,

¹Defense counsel did seek and receive a jury instruction on the general subject of prior inconsistent statements. Trial Transcript Vol. IV at 111-12; Trial Transcript Vol. V at 77-78.

Knight v. State, Criminal Nos. 96-80 & 96-81 (Me. Super. Ct. July 27, 1998) (“Order”), filed with Response. On the issues of defense counsel’s failure to seek admission of the Satanism evidence at trial or to object to or seek limiting instructions on the use of prior inconsistent statements, the reviewing justice observed:

Justice Kravchuk [the trial justice] advised counsel that the issue of Satanism was unavailable during opening statement — and presumably forevermore unless some issue cropped up making such evidence relevant. While a Motion in Limine is not deemed final until the evidence is proffered — and thus not subject to appellate review — a Motion in Limine can become “the law of the case” for the purposes of evaluating attorney performance. After a Judge has ruled upon a point and made her position clear, an attorney has no duty to retender the exact argument knowing full well that it will be resolved against him. Retendering the argument serves only one procedural purpose — preserving the issue for appeal.

The issue of Satanism (and the witnesses who would offer such evidence) was not preserved for appeal by counsel. As noted above, this does not ipso facto render the attorneys’ performance substandard. Counsel admit, and the court agrees, that the trial court’s decision excluding the Satanism was appropriate. It would have been upheld on appeal. The fact that counsel did not preserve it for appeal does not prejudice the Petitioners in any fashion.

In a similar fashion, the fact that counsel declined to have the court give an explanatory instruction regarding prior inconsistent statements by State’s witness does not constitute ineffective assistance of counsel. On the contrary, it is likely that counsel simply sought to avoid emphasizing this testimony by such an instruction. The distinction between prior inconsistent statements being offered as substantive evidence (ie. — to prove the truth of the matter asserted) as in Rule 801(d)(1)(A), and prior inconsistent statements being used merely to impeach as in Rule 607 is often lost on attorneys and other individuals who are familiar with the Rules of Evidence. To a jury, it may be perceived as a distinction without a difference. By stopping the proceedings and requesting such an instruction, an attorney runs the risk of highlighting the troublesome testimony without reaping the benefit of the cautionary instruction. Again, the decision to forgo such an instruction is a strategic decision by counsel for which the court affords a high degree of deference.

Id. at [6].

The reviewing justice also rebuffed a claim that the petitioner had been denied his right to

testify at trial, finding that the petitioner “was aware of his rights and made a knowing decision not to testify.” *Id.* at [6]-[7].

The petitioner appealed his post-conviction review order to the Law Court, which on September 30, 1998 denied a certificate of probable cause. Order Denying Certificate of Probable Cause, *Knight v. State*, Docket No. Wal-98-451 (Me. Sept. 30, 1998), filed with Response. The instant Petition was timely filed on September 2, 1999. Petition at 1; Response at 3-5.

II. Discussion

The petitioner attacks his state-court conviction on four grounds: (i) ineffective assistance of counsel based on counsel’s failure to preserve the Satanism issue for appeal, (ii) ineffective assistance of counsel as a result of counsel’s failure to object to or request a limiting instruction with respect to hearsay evidence of prior inconsistent statements used to impeach witnesses, (iii) ineffective assistance of counsel as a consequence of counsel’s failure to object to or seek a limiting instruction with respect to use of prior inconsistent statements and (iv) denial of the petitioner’s right to testify in his own behalf. Petition at 5-6. I see no apparent difference between the second and third grounds, which I will consider to comprise a single ground.

Turning first to the petitioner’s allegation that he was denied the right to testify, he relies entirely on the statement that “[d]espite expressing an [sic] desire to do so, counsel did not allow petitioner to testify in his own behalf.” Petition at 6. He proffers no new evidence that would call into question the finding of the reviewing justice, following an evidentiary hearing in his state post-conviction proceeding, that he made a knowing decision not to testify at trial. Bare conclusory allegations in a habeas petition are insufficient to merit the granting of an evidentiary hearing. *See, e.g., David*, 134 F.3d at 478 (“To progress to an evidentiary hearing, a habeas petitioner must do

more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings.”).

The petitioner’s remaining grounds, alleging ineffective assistance of counsel, suffer from a similar fatal flaw; he fails to clarify the nature of his claims or in any other way support them. Claims of ineffective assistance of counsel are measured by the yardsticks set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must first show that counsel’s performance was deficient, *i.e.*, that the attorney “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Second, the defendant must make a showing of prejudice, *i.e.*, “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* The court need not consider the two elements in any particular order; failure to establish either precludes judgment in the defendant’s favor. *Id.* at 697. The court “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Argencourt v. United States*, 78 F.3d 14, 16 (1st Cir. 1996) (quoting *Strickland*) (internal quotation marks omitted). The “prejudice” prong of the *Strickland* test entails more than demonstration of a possibility that counsel’s errors had some conceivable effect on the outcome of the proceeding. *Id.* A defendant must affirmatively prove a reasonable probability that the result of the proceeding would have been different if not for counsel’s errors. *Id.*

Neither of the petitioner’s allegations of ineffective assistance of counsel clears the high hurdle of the *Strickland* test. The petitioner offers no new evidence or argumentation that would cast doubt on the conclusions of the post-conviction review justice that the exclusion of the Satanism

evidence would have been upheld on appeal or that forgoing requests for limiting instructions on the use of prior inconsistent statements fell within the bounds of sound trial strategy.

Inasmuch as appears, evidence of DeWalt's alleged Satanic beliefs could not have been admissible for the purpose of impeaching his credibility given the lack of evidence that such beliefs bear on truthfulness.

With respect to the use of past inconsistent statements, the Law Court has “consistently held that a witness may be impeached by evidence that he made an earlier, out-of-court statement inconsistent with his trial testimony.” *State v. Brine*, 716 A.2d 208, 211 (Me. 1998) (citation and internal quotation marks omitted). Two preconditions must be met: “[T]he out-of-court statement must be truly inconsistent with the witness’s trial testimony, and the impeachment must be based on a ‘relevant’ and not a ‘collateral’ matter.” *Id.* (citations and internal quotation marks omitted). Finally, even if the preconditions are met, the trial judge must assess whether the danger of unfair prejudice substantially outweighs the probative value of the evidence — a judgment call with respect to which he or she is afforded wide discretion.² *Id.*

The petitioner identifies no respect in which the State improperly used prior inconsistent statements during his trial. Nor is it readily apparent from review of the trial transcripts that he was prejudiced in the *Strickland* sense, *e.g.*, that it is reasonably probable that the outcome at trial would have been different but for counsel’s alleged errors. The contents of the past inconsistent statements were indeed damaging to the petitioner’s case. However, the State also elicited direct testimony

²“The danger of unfair prejudice arises from the risk that the out-of-court statement would be used by the jury as substantive proof of the defendant's guilt.” *Brine*, 716 A.2d at 211. “Prejudice, in this context, means more than simply damage to the opponent’s cause. . . . What is meant here is an undue tendency to move the tribunal to decide on an improper basis.” *Id.* (citations and internal quotation marks omitted).

from both Teresa and Lisa implicating the petitioner in Pinkham's murder. *See* Trial Transcript Vol. III at 24-25 (testimony of Teresa that "[a]ll four of them," including the petitioner, told her "bits and pieces" of what happened the night that Pinkham was killed; the petitioner relayed that a rope was put around Pinkham's neck and socks stuffed in his mouth; DeWalt had said that "the boys had dragged him down in the water once and they didn't do it right the first time, so the second time he had to do it."); 131-32, 134-35 (testimony of Lisa that petitioner told her on the night of the killing that Pinkham needed to be killed and she tried to talk him out of it, and that petitioner reported that "he'd had Tim in the water" but then DeWalt did rest of work and drowned him). The evidence thus would have supported a conviction for murder even were the prior inconsistent statements excluded or a limiting instruction given. *See, e.g., Fenske v. Thalacker*, 60 F.3d 478, 482 (8th Cir. 1995) (inasmuch as evidence supported conviction for burglary even in absence of prior inconsistent statements, counsel's failure to request limiting instruction did not render result at trial unreliable).³

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's habeas corpus petition be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review

³In addition, defense counsel did seek and receive a general jury instruction to the effect that past inconsistent statements were not to be credited as establishing the truth of the matter recited therein.

by the district court and to appeal the district court's order.

Dated this 30th day of November, 1999.

David M. Cohen
United States Magistrate Judge